STATE OF MICHIGAN
*IN THE SUPREME COURT*
Appeal from the Court of Appeals

GRIEVANCE ADMINISTRATOR,
STATE OF MICHIGAN,
ATTORNEY GRIEVANCE COMMISSION,

Petitioner-Appellant,

-vs-

S Ct #127547
ADB #01-055-GA

GEOFFREY N. FIEGER, P30441,

Respondent-Appellee.

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# *BRIEF ON APPEAL – RESPONDENT-APPELLEE*


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The Attorney Discipline Board said, "Yes".
Petitioner-Appellant says, "No".
Respondent-Appellee says, "Yes".

II.

MR. FIEGER'S HYPERBOLIC, SATIRICAL PUBLIC STATEMENTS ABOUT THREE JUDGES WERE MANIFESTLY POLITICAL SPEECH PROTECTED BY U.S. CONST, AM I & XIV, AND CONST 1963, ART 1, §5.

The Attorney Discipline Board said, "Yes".
Petitioner-Appellant says, "No".
Respondent-Appellee says, "Yes".

III.

BECAUSE RESPONDENT-APPELLEE'S PUBLIC CRITICISMS OF THREE JUDGES OF THE COURT OF APPEALS DID NOT OCCUR BEFORE THE TRIBUNAL, NEITHER MRPC 3.5(c) NOR 6.5(a) WAS VIOLATED.

The Attorney Discipline Board plurality said, "Yes".
Petitioner-Appellant does not address this issue.
Respondent-Appellee says, "Yes".

## COUNTER-STATEMENT OF PROCEEDINGS AND FACTS

### Introduction

For the past decade, a pitched battle has raged in Michigan's legislature and courts over the rights of victims of discrimination, medical malpractice and corporate irresponsibility. At stake is whether these individuals will have meaningful access to the courts and fair compensation for their frequently devastating injuries. The principal participants in this intense struggle have been insurance companies, trade associations, labor unions, politicians, lawyers *and* — in this state in which all judges are elected — judges.[1]

During John Engler's tenure as governor, the state's Republican-controlled legislature — at the urging of supporters such as the Michigan Chamber of Commerce, the Michigan Manufacturers Association and the Michigan State Medical Society, and over the vigorous opposition of the state's

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[1]For example, in a May 17, 2000, speech to the Michigan State Medical Society, Justice Markman referred to plaintiffs' personal injury lawyers as "*our opponents*, the people who quite frankly make a livelihood by suing you and those who you represent" (emphasis added). In the same speech, Justice Markman boasted that Michigan was the only state in which medical malpractice "reform" had been upheld; he also asserted that those opposing his and his Republican-nominated colleagues' election "hated" the Court [See Exhibit A to Answer to Application for Leave to Appeal].

Opposition to "trial lawyers" in general and Mr. Fieger in particular – even though Mr. Fieger was not a candidate for any office that year – was central to the 2000 campaigns of Justices Taylor, Young and Markman: In an August 26, 2000, speech to the Michigan Republican Party convention, Justice Young claimed that "Geoffrey Fieger and his trial lawyer cohorts hate this court. There's honor in that" [See Exhibit B to Answer to Application for Leave to Appeal]; the September 3, 2000, Owosso Sunday Independent reported that, at a fund-raiser four days earlier, Justice Young had claimed that "Geoffrey Fieger currently has $90 million of lawsuit awards pending in the state Court of Appeals" [See Exhibit C to Answer to Application for Leave to Appeal]; a political advertisement supporting Justices Taylor, Young and Markman titled "He's back ..." featured a photograph of Mr. Fieger and contended that Mr. Fieger was "trying to take over the Michigan Supreme Court"; the same ad characterized the Democratic-nominated candidates as "FIEGER's FRIENDS" and "the Fieger team".

Democratic party and organizations such as the Michigan Trial Lawyers Association — passed legislation dramatically reducing the rights of individuals damaged by corporations, employers, doctors, hospitals and others to obtain compensation for their injuries.[2] Organizations such as the Grand Rapids Area Chamber of Commerce and the Michigan Manufacturers Association openly boasted of their desire to re-shape Michigan's courts to support their desired policies, and they trumpeted their satisfaction when legislative and judicial electoral results went their way. *Cf., e.g.*, September 24, 1999, issue of Michigan Manufacturers Weekly, which included the following statement in an article on Justice Markman's appointment to this Court:

> *During 1998-1999, MMA-PAC contributions swayed the Supreme Court election to a conservative viewpoint, ensuring a pro-manufacturing agenda ...*

(emphasis added); September 30, 1999, press release from the Grand Rapids Area Chamber of Commerce encouraging supporters to attend an October 4, 1999, reception to be attended by, *inter alia*, then-Chief Justice Weaver and Justices Taylor, Corrigan and Markman to raise funds for the election of

> pro-business legislators ... [and] pro-business judicial officials as well ... proceeds raised at the ... event will be used throughout next year's election cycle to support pro-business candidates at the state's legislative and judicial levels."

See also October 5, 1999, article from the Grand Rapids Press reporting that Justices Taylor, Corrigan, Young and Markman, in fact, attended the reception; see also Justice Markman's May 17, 2000, speech to the Michigan State Medical Society, *supra*, at n 2.

Within this Court, the on-going conflict has played itself out in bitterly contested cases that

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[2] *Cf., e.g.*, MCLA §600.1483 (establishing limits on noneconomic loss damages); MCLA §§600.6303 and 600.6304 (eliminating joint and several liability).

have severely divided the Court along partisan lines.[3] The partisanship in these cases has been so extreme that, in at least one case in which Mr. Fieger was plaintiff's counsel, the competing statements of facts of the majority and dissenting justices read like they were drawn from entirely separate cases.[4]

As an uncommonly talented trial lawyer who has devoted his professional life to fighting for the rights of the disadvantaged, as the 1998 Democratic Party candidate for governor of Michigan, and as a national television and radio personality, Mr. Fieger has been a frequent combatant in this struggle. He has spoken consistently and passionately about his views of the injustices inflicted on the poor, and he has spoken out about the legal and moral responsibility of those in positions of power who, in his judgment, have perpetrated these injustices. Society's obligation to provide meaningful access to the courts to these victims was, in fact, a central theme of Mr. Fieger's gubernatorial campaign.

Mr. Fieger's outspokenness has earned him considerable popularity in many quarters around the state and across the nation; it has likewise left him viscerally disliked by others, including some of those in power. In fact, given the many public statements about him by members of this Court and the basis for this Court's decision in Gilbert v DaimlerChrysler, 470 Mich 749, 685 NW2d 391 (2004), any reasonably prudent Michigan attorney who follows this Court's decisions and the public statements of its members could fairly conclude that a majority of this Court is overtly hostile to Mr. Fieger.

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[3] *Cf., e.g.*, Shinholster v Annapolis Hospital, 471 Mich 540, 685 NW2d 275 (2004); Kreiner v Fischer, 471 Mich 109, 683 NW2d 611 (2004); Gilbert v DaimlerChrysler Corp, 470 Mich 749, 685 NW2d 391 (2004); Waltz v Wyse, 469 Mich 642, 677 NW2d 813 (2004).

[4] *Cf.* Gilbert, *supra*, 470 Mich at 755-761, 793-806.

Just as those who hold public office — including judges — do not wait until shortly before election day before campaigning for re-election, those critical of public office-holders' acts cannot and do not wait until shortly before election day to make known their views of the officer-holders' fitness or lack thereof.[5]

The statements at issue in this case were made by Mr. Fieger in his capacity as a nationally recognized Democratic politician, trial lawyer and radio talk show host. Satirically and hyperbolically, he was roasting on his radio program three judges he believed had unfairly deprived a Michigan citizen of compensation that an Oakland County jury had found he was entitled to receive. These hyperbolic statements can only be properly understood in the context of this on-going, public, highly political battle.

Case History

In March 1993, Salvatore Badalamenti, a finish carpenter, suffered a heart attack. He sought treatment at William Beaumont Hospital-Troy. Mr. Badalamenti later developed gangrene, as a result of which both of his legs were amputated at the knee. His fingers and thumbs were also lost, effectively leaving him without hands.

Believing that this horrendous result was attributable to medical negligence when his cardiogenic shock was not appropriately treated, Mr. Badalamenti retained a lawyer in order to investigate the circumstances of his injuries. After investigation and the securing of a medical expert's opinion, the retained firm, in turn, retained Mr. Fieger's services to try the case in Oakland

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[5]Even more so than laws restricting the posting of political signs until shortly before an election – laws which themselves do not withstand constitutional scrutiny, *cf.*, *e.g.*, Dimas v City of Warren, 939 F Supp 554 (ED Mi 1996); Antioch v Candidates' Outdoor Graphic Service, 557 F Supp 52 (ND Cal 1982) – any attempt to limit campaign speech to a given time-frame would violate the First Amendment.

County Circuit Court. Badalamenti v William Beaumont Hospital-Troy, 237 Mich App 278, 281-282, 602 NW2d 854 (1999).

Mr. Fieger tried Mr. Badalamenti's case before a jury, which found in Mr. Badalamenti's favor, returning a large monetary award. The trial judge, the late Hon. Robert C. Anderson, denied the defendants' post-trial motions for relief from the judgment.

On August 20, 1999, shortly after Mr. Fieger's campaign for governor, a panel of the Court of Appeals reversed, concluding that the plaintiff had failed to present sufficient evidence of cardiogenic shock to the jury. Specifically, the panel uniquely held that plaintiff's expert's opinion was insufficient because it was "*inconsistent* with the testimony of a witness who personally observed an event in question, and the expert [was] unable to reconcile his inconsistent testimony other than by disparaging the witness' power of observation." 237 Mich App at 286 (emphasis added).[6]

In lengthy and strident dictum, the panel also gratuitously took aim at Mr. Fieger personally, alleging that he had engaged in such "egregious" conduct during the trial that the defendants would be entitled to a new trial even if reversal had not already been ordered. *Id.* at 289-294. The very experienced trial judge had not at any point during the trial sanctioned Mr. Fieger, however, and he had found no merit whatever in the defendants' post-trial motion for a finding of misconduct. *Id.* at 293. The panel nevertheless asserted that Mr. Fieger's conduct "far exceed[ed] permissible

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[6]The logic of the panel's holding, if applied in other cases, would preclude admission of any expert opinion testimony shown to be "inconsistent" with eyewitness testimony presented by the opposing party. Such a rule confers on "personally observed" testimony a wholly unwarranted status.

bounds". *Id.* at 289.[7]

Mr. Fieger firmly believed that the panel had done his client and him a grave injustice: Not only had the jury's award been taken away, the court had dismissed the case, precluding a re-trial. Mr. Fieger was also highly offended at the panel's unsubstantiated personal attack on him by judges he believed were political allies of his opponent in the previous year's gubernatorial race and that these judges were willing to sacrifice Mr. Badalamenti's legitimate claim for damages on the altar of "Get Fieger".

In addition to practicing law, in 1999 Mr. Fieger was employed by CBS Radio as the host of a radio talk show, "Fieger Time", a free-ranging talk program which was often political, satirical and/or comic and which began within weeks of the 1998 gubernatorial election. During broadcasts of "Fieger Time" on August 23 and 25, 1999 – three and five days *after* Badalamenti had been decided by the Court of Appeals; that is, *after* Mr. Badalamenti's case had been dismissed by the court – Mr. Fieger, in his capacity as a radio talk show host and victims' rights advocate, expressed his feelings about what the judges on the panel had done, their politics and their decision. His comments were the then-latest chapter in the ongoing struggle over the rights of victims of negligence and greed to obtain some measure of compensation in court.

On April 16, 2001, Petitioner-Appellant filed the one-count Formal Complaint in this case. The complaint, which Respondent asserts took his statements out of context, alleged that Mr. Fieger said --

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[7]Four justices of this Court similarly attacked Mr. Fieger's trial conduct in Gilbert, *supra*, in order to take the jury's verdict away from Ms. Gilbert on these same grounds despite a trial and appellate record which clearly contradicts the majority's claims. *Cf.* 470 Mich at 755-761, 793-806.

• "Hey Michael Talbot and Bandstra, and Markey, I declare war on you. You declare it on me, I declare it on you. Kiss my ass, too." ¶10(a),

• "lost both his hands and both his legs, but according to the court of appeals, he lost a finger. Well, the finger he should keep is the one where he should shove it up their asses." ¶10(b),

• "three jackass Court of Appeal [*sic*] Judges", ¶11(a),

• "I know the only thing that's in their endo should be a large, you know, plunger about the size of, you know, my fist", ¶11(b), and

• "They say under their name, Court of Appeals Judge, so anybody that votes for them, they've changed their name from, you know, Adolf Hitler and Goebbels, and I think -- what was Hitler's -- Eva Braun, I think it was, is now Judge Markey. I think her name is now Markey, she's on the Court of Appeals." ¶11(c).

Numerous other statements were made during the show by Mr. Fieger's associates on the program.

The Formal Complaint charged Mr. Fieger with violating MRPC 3.5(c) and 6.5(a) for making the above out-of-court statements. The Formal Complaint did *not* allege that *any* of Mr. Fieger's challenged statements were knowingly or recklessly false statements of fact, and it did *not* allege that any of his comments were likely to prejudice an adjudicative proceeding.

Mr. Fieger moved for summary disposition. In a May 21, 2002, opinion, the hearing panel denied the motion.

In late 2003, in order to address what he believed and the Board later concurred was the unconstitutional application of these rules to his out-of-court statements, Mr. Fieger entered a

*conditional* plea of no contest to the allegations of the Formal Complaint, *conditionally* accepting the imposition of a reprimand and specifically preserving his right to appeal the issues previously raised before the hearing panel. As a part of the conditional plea agreement, the Commission agreed to strike the allegations of ¶16 that Mr. Fieger's conduct allegedly violated MCR 9.104(A)(1)-(4) and MRPC 8.4(a) and (c). On January 9, 2004, the panel issued an order accepting the conditional plea.

On January 12, 2004, Mr. Fieger timely filed petitions for review and for stay of the hearing panel's order. MCR 9.118(A)(1) and 9.115(K).

On November 8, 2004, the Attorney Discipline Board issued its decision and an Order Vacating Hearing Panel Order of Reprimand and Dismissing Formal Complaint. In arriving at its conclusion, the Board plurality painstakingly analyzed the prior attorney and judicial officer First Amendment decisions of the United States Supreme Court and this Court, ultimately stressing that

> When our Supreme Court's opinions in Chmura I and Chmura II are read together and with the numerous United States Supreme Court opinions which support them, we must conclude that attorney statements which do not involve assertions of fact are protected by the First Amendment outside the context of a pending proceeding.

Board opinion at pp 22.

The Board's decision reaffirms that an attorney's non-factual out-of-court statements which are alleged to be "discourteous" – even when those statements are about judges – are absolutely protected by the First Amendment and that arguments to the contrary are incompatible with the fundamental American right to freedom of expression.

## STANDARD OF REVIEW

Petitioner-Appellant has correctly identified the standard of review applicable to each of the issues presented in this appeal.

## ARGUMENT

### I.

AS THE ADJUDICATIVE ARM OF THIS COURT FOR ATTORNEY DISCIPLINE MATTERS, THE ATTORNEY DISCIPLINE BOARD HAS THE AUTHORITY TO CONSIDER CONSTITUTIONAL ISSUES PRESENTED; BECAUSE ITS RULING IN THIS CASE DID NOT FIND ANY RULE OF PROFESSIONAL CONDUCT TO BE UNCONSTITUTIONAL, THIS CASE PRESENTS NO ISSUE REGARDING THE BOARD'S AUTHORITY TO DECLARE A RULE UNCONSTITUTIONAL.

On the one hand, the Administrator argues that the Attorney Discipline Board lacks authority to declare a rule of professional conduct unconstitutional; on the other, it concedes that the Board has the authority to consider constitutional principles in its decision-making. Petitioner's Brief at pp 3-7. The Administrator cites no authority for the unique proposition that the Board has some authority to consider constitutional law questions but only up to a point. The absence of any such authority reveals the complete lack of merit of the Administrator's argument.

In its ruling below, the Board did *not* declare any rule of professional conduct to be unconstitutional. In the event the Board ever finds a rule to be unconstitutional in a future case, the issue raised by the Administrator will become ripe for this Court's consideration. For purposes of this case, however, the argument is not only disingenuous and misleading, it is utterly beside the point.

Consistent with its duty to apply all relevant law to the facts and issues at hand, the Board

quite unremarkably considered prior decisions of this Court and the United States Supreme Court in concluding that MRPC 3.5(c) and 6.5(a) should be construed in such a manner as to *avoid* a constitutional problem. Board Opinion at p 15. There is a marked difference between finding a rule or statute unconstitutional and construing it in such a manner as to avoid an unconstitutional application, a power the Administrator concedes to the Board. Brief at pp 6-7.

The "Attorney Discipline Board is the adjudicative arm of" this Court "for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan attorneys". MCR 9.110(A). Among its duties is review of hearing panel orders of discipline and dismissal, MCR 9.118(E)(4), including the authority to "affirm, amend, reverse, or nullify the order of the hearing panel, in whole or in part or order other discipline." Grievance Administrator v Grimes, 414 Mich 483, 489, 326 NW2d 380 (1982).

Moreover, "[e]xcept as otherwise provided in these rules, the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel". MCR 9.115(A). Since issues of constitutional law may be raised in non-jury civil actions and no rule prohibits either the Administrator or a respondent attorney from raising issues of constitutional law before a hearing panel, it may reasonably be inferred that hearing panels appointed by the Board, MCR 9.110(E)(2), have the authority to consider such questions. Since it would be absurd for hearing panels to have greater authority to consider constitutional law questions than does the Board, Rule 9.115(A) is further evidence of the Board's authority to consider such questions.

Given the broad range of issues which come before the Board and the regularity with which issues of constitutional law are intertwined with those issues, it would make no sense for the Board's authority not to include the authority to consider questions of constitutional law. Not only does the

Board from time to time consider questions of political speech, with their attendant First Amendment implications, it also considers questions of commercial speech, with their attendant First Amendment implications,[8] issues of the Fifth Amendment privilege,[9] issues of due process[10] and other constitutional law issues. In Grievance Administrator v MacDonald, ADB #00-190-GA (2002), the Board well-stated its relationship with this Court and its responsibilities regarding issues of constitutional law:

> The attorney discipline process does not operate in a constitutional vacuum. Rather, the Attorney Discipline Board acts in conformity with its statutory grant of authority and is cognizant of both federal and state case law precedent regarding constitutional issues.

Quoting from Grievance Administrator v Tucker, ADB #94-12-GA (1995), lv den 449 Mich 1206 (1995), the Board spoke to its approach for considering questions of constitutional law:

> "As the adjudicative arm of the Michigan Supreme Court for attorney discipline matters this Board is not infrequently faced with claims that a respondent's constitutional rights have been or will be jeopardized in the course of disciplinary proceedings. While recognizing its limited grant of authority, the Board has considered such claims and has applied constitutional precedents in the context of the discipline matters before it."[11]

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[8]Grievance Administrator v Moffett, ADB #103/84 (1985) (considering relationship of Bates v Arizona, 433 US 350 (1977), to then-applicable rules regarding attorney advertising).

[9]Grievance Administrator v Eston, ADB #75/85 (1987).

[10]Grievance Administrator v Clark, ADB #95-59-GA (1997) (considering relationship between due process and lengthy delay in the filing of a formal complaint).

[11]Consider also Fieger v Thomas, 74 F3d 740, 747 (6th Cir 1996), where the Sixth Circuit observed that

> Like the Ethics Committee in New Jersey, the Board "constantly [is] called upon to interpret the state disciplinary rules." Even if the Board could not declare a Rule of Professional Conduct unconstitutional – a proposition about which we are not convinced – "it would seem an unusual doctrine, and one not supported by the

Considering the infrequency with which this Court takes up questions involving the attorney discipline system, in the vast bulk of cases presenting questions of constitutional law the Board is the only review tribunal before which those questions will be considered. Considering also that, unlike the attorney discipline systems of most other states, *cf.* Wolfram, Modern Legal Ethics (West) §3.4.5, Michigan's system does not provide for a right of judicial review, the practical need for Board authority adequate to consider all questions presented to it is particularly great. If the Board were held to lack the authority to consider constitutional questions, neither an attorney charged with professional misconduct nor the Administrator would have a right to have their constitutional concerns addressed before *any* review tribunal. This would be both an unconstitutional procedure and bad policy. It would leave the Board with responsibilities far in excess of the tools necessary to carry out those responsibilities, and it would leave Michigan lawyers with no guaranteed forum in which infringements of their constitutional rights could be corrected.

Construing the Board's authority to preclude full consideration of constitutional law would raise extremely serious due process concerns. In the absence of either Board authority to consider questions of constitutional law or a right to judicial review of the Board's decisions, the central reason heretofore for federal abstention from intervention in attorney discipline proceedings would be eliminated. As the United States Supreme Court noted in Middlesex County Ethics Committee v Garden State Bar Association, 457 US 423, 432, 102 SCt 2515, 73 LEd2d 116 (1982),

> Where vital state interests are involved, a federal court should abstain "*unless state*

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cited cases, to say that the [Board] could not construe [the Rules of Professional Conduct] in the light of federal constitutional principles."*Ohio Civil Rights Comm'n v. Dayton Christian Sch.*, 477 U.S. 619, 629, 91 L. Ed. 2d 512, 106 S. Ct. 2718 (1986). The Board could, short of declaring a Rule unconstitutional, refuse to enforce it or, perhaps, narrowly construe it.

*law clearly bars the interposition of the constitutional claims..."*

(cite omitted; emphasis added). See also Fieger v Thomas, 74 F3d 740, 748 (6th Cir 1996) ("as the Supreme Court explained in *Dayton Christian Schools,* 'it is sufficient under *Middlesex* that constitutional claims may be raised in state-court review of the administrative proceeding.'").

With respect to the constitutional significance of a right to judicial review, see Statewide Grievance Committee v Presnick, 215 Conn 162, 169, 575 A2d 210 (1990) ("'In [presentment] proceedings such as this a defendant is entitled to notice of the charges against him, to a fair hearing, and a fair determination, in the exercise of a sound judicial discretion, of the questions at issue, and to an appeal to this court for the purpose of having it determined whether or not he has in some substantial manner been deprived of such rights.'" (cite omitted)); Amsden v Moran, 904 F2d 748, 755 (1st Cir 1990) ("The availability of judicial review is an especially salient consideration in situations where permits and licenses have been denied or revoked by state or local authorities in alleged derogation of procedural due process.").

The practicalities of the attorney discipline system strongly argue in favor of the Board's authority to consider constitutional law questions. While the Administrator raises the specter of a run-away Board undercutting this Court's rules, its fears are wholly unsupported by experience or logic. To the contrary, the Board's authority to consider questions of constitutional law provides an important opportunity for the Board to *implement* decisions of this Court and the United States Supreme Court which impact on the attorney discipline process but which have not yet been addressed by this Court and which this Court would be very unlikely to address as promptly.

For example, at the time the United States Supreme Court substantially expanded the permissible scope of attorney advertising in Shapero v Kentucky Bar Association, 486 US 466, 108

SCt 1916, 100 LEd2d 475 (1988), MRPC 7.3 precluded virtually all solicitation of prospective clients other than those with whom the lawyer had a family or prior professional relationship. In order to conform the rule to the Court's holding in Shapero, this Court amended the rule effective January 1, 1990.[12] Shapero, however, had been decided in June 1998 and was decided on First and Fourteenth Amendment grounds. If the Board had been unable either to declare the prior version of MRPC 7.3 unconstitutional or to construe it in light of Shapero in the one and a half years between the time Shapero was decided and the date on which the amended rule became effective, any case charging an attorney with violating Rule 7.3 for conduct protected by Shapero would have been, at best, left in unnecessary limbo; at worst, attorneys whose conduct was constitutionally protected would have been convicted of misconduct pursuant to a rule which had become obviously unconstitutional.[13]

While the Administrator is admittedly free to reverse position on an issue from one case to

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[12]The amendment added the language "nor does the term 'solicit' include 'sending truthful and nondeceptive letters to potential clients known to face particular legal problems' as elucidated in *Shapero v Kentucky Bar Ass'n*" (cite omitted).

[13]Other examples could arise as a result of decisions of this Court interpreting the Michigan constitution. It is possible, for example, that this Court could one day determine in a licensing proceeding involving a registered nurse that the Michigan constitutional right to counsel in criminal cases, Const 1963, art 1, §20, extends to a right to appointed counsel for an indigent nurse respondent in those quasi-criminal proceedings. Without having had an attorney discipline case before it at the time, the Court's ruling would not on its face apply to attorney discipline proceedings. Nevertheless, assuming the logic of the Court's decision extended to all professional licensing proceedings, *cf.* also American Bar Association Model Rules for Lawyer Disciplinary Enforcement, Rule 34 (counsel for indigent respondent), it would make no sense whatever to preclude the Board from applying the nursing case ruling to any pending attorney discipline case presenting the same question. While such a ruling by the Board would mean that the Board was, in a narrow sense, engaging in a rule-making function which is otherwise the responsibility of this Court, it would be an entirely sensible and practical act furthering, not frustrating this Court's jurisprudence.

the next, doing so necessarily raises questions as to the reasons for any such change. In its repeated and presumably carefully considered argument in Fieger v Thomas, *supra*, that the Board has the authority to consider constitutional claims,[14] the Administrator told the Sixth Circuit that the Board had the authority to rule on constitutional issues. At the time, taking that position would hopefully – and did, in fact – avert a federal court challenge to Michigan's attorney discipline system procedures. The Administrator is now arguing precisely the opposite in a case where the Board has ruled against him in reliance, in part, on constitutional principles. The hypocrisy of the Administrator's position necessarily leads one to wonder whether the Administrator would hesitate to reverse course yet again if, in a different case, the constitutional shoe were on the other foot.

The Administrator's reliance on Wikman v City of Novi, 413 Mich 617 (1982), is misplaced. The Tax Tribunal, unlike the Board, is not a judicial branch body; it is within the Department of Treasury. MCLA §205.721. Moreover, the Administrator misstates the cited language. This Court in Wikman did not make the flatly prohibitory statement attributed to it by the Administrator, Brief at p 6; the Court's actual language prefaces the quoted language with the limiting words "Generally speaking". 413 Mich at 646. Further, the Wikman plaintiffs were not seeking invalidation of a statute on constitutional grounds.

Finally, the Administrator's argument that the presence of three lay members on the Board is inconsistent with authority to consider questions of constitutional law, Brief at p 6, is a non-sequitur. Each member of the Board has the same authority and responsibility to consider the issues

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[14]"[C]ounsel for the Commission has stated in her briefs and oral argument before the district court and the appellate panel that the hearing panel and the Board are not precluded from hearing Fieger's constitutional claims." 74 F3d at 747.

presented to the body, and this Court presumably considers the full range of a prospective appointee's competence before appointing any member to the Board. Non-lawyers in positions of public trust are, in fact, frequently called upon to consider issues of constitutional law. School boards and library boards, for example, frequently consider issues involving the First Amendment, and school boards are often called upon to consider Fourth Amendment issues as well. Legislatures regularly consider a broad range of constitutional law questions. Each of these bodies is routinely comprised of non-lawyers and lawyers alike. Not only are non-lawyers competent to consider issues of constitutional law, the complexity and subtlety of many of the ethics issues considered by the Board equal or exceed that of some constitutional law questions.

In sum, the question of the Board's authority to declare a rule of this Court unconstitutional is not properly before the Court, and the Court should not consider the question; alternatively, the Board's authority to construe the rules of professional conduct to avoid an unconstitutional construction or, as appropriate, to find a rule unconstitutional should be explicitly affirmed by this Court.

II.

MR. FIEGER'S HYPERBOLIC, SATIRICAL PUBLIC STATEMENTS ABOUT THREE JUDGES WERE MANIFESTLY POLITICAL SPEECH PROTECTED BY U.S. CONST, AM I & XIV, AND CONST 1963, ART 1, §5.

There is no question that if the statements at issue in this case had been made by a non-lawyer, the maker of the statements could have suffered no legal consequences whatever as a result of the utterance. All would agree that these statements were completely protected by the First Amendment. If a non-lawyer colleague of Mr. Fieger's on his radio show, rather than Mr. Fieger, had made the remarks at issue, no action could be taken. Similarly, if Mr. Fieger or any other attorney had made comparable remarks regarding a member of the legislature or the state's governor or attorney general, the remarks would not be actionable.

The question then becomes whether there is a compelling state interest justifying a restriction on this fundamental right. That is, is there something so overwhelmingly significant about an attorney's status as a member of the Bar and about the status of the judicial branch in relation to its presumptively co-equal branches of government that this cherished right to speak out may be abridged as to an attorney's mere statements made outside of a courtroom setting after a case has been decided? Simply but emphatically, there is not.

It also cannot be stressed strongly enough that, as a practical matter, the First Amendment *primarily* protects repulsive speech: *Speech which does not offend persons in power requires no protection from persons in power.*

The broad protections of the First Amendment exist not just to provide ample breathing room for the *speaker's* right to free expression. They exist also to protect the right of the citizenry to

*receive* the broadest possible range of views, for the "right to receive information and ideas, regardless of their social worth ... is fundamental to our free society". Stanley v Georgia, 394 US 557, 89 SCt 1243, 22 LEd2d 542 (1969) (citation omitted).[15]

In upholding Mr. Fieger's free speech rights in this case, the Board carefully reviewed and applied controlling case law from this Court and the United States Supreme Court. In particular, the Board considered this Court's opinions in Chmura I, *supra*, and Chmura II, *supra*. Chmura, of course, involved a judge seeking to retain his judicial office through blatant appeals to racial prejudice, claiming, *inter alia*, that then-Detroit Mayor

> "Coleman Young wanted your money, but one man stood in the way ... Judge John Chmura"

and asserting further that if his opponent were elected, the result would be

> "*[i]nnocent victims, raped, murdered and dismembered.*"

461 Mich at 520, 521 (emphasis added). The Judicial Tenure Commission had concluded that Judge Chmura had waged a "'brass knuckles'" campaign and that

> ... Respondent's campaign literature, individually and as a whole, reveals beyond any

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[15]See also Oklahoma Bar Association v Porter, 766 P2d 958, 967 (1988), where the respondent attorney had publicly stated to the press, shortly after a client's sentencing, that the judge in the case "showed all the signs of being a racist". Refusing to discipline Porter, the Oklahoma Supreme Court stressed:

> The counterpoint to the right to speak is the right of the listener to receive a free flow of information. The First Amendment goes beyond protection of the press and individual self-expression to prohibit the government from limiting the stock of information from which members of the public may draw... This concomitant right to receive information has been referred to as a freedom to listen... The right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences is crucial, for it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.

> reasonable doubt a conscious effort to use false, fraudulent, misleading and deceptive statements as part and parcel of his campaign strategy. The materials themselves speak eloquently to this point, as they cover a broad spectrum of issues and are consistently untruthful.

*Id.* at 525-526.

To this Court, the then-applicable Canon 7(B)(1)(d) of the Michigan Code of Judicial Conduct, the ethics provision under which Judge Chmura had been prosecuted, infringed on the judge's First Amendment rights. At the time, the Canon prohibited a candidate for judicial office from making any statement "the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law". While the canon was designed

> to promote *civility* in campaigns for judicial office ... [n]evertheless, the state's interest in preserving public confidence in the judiciary does not support the sweeping restraints imposed by Canon 7(B)(1)(d). The prohibition on misleading and deceptive statements quells the exchange of ideas because the safest response to the risk of disciplinary action may sometimes be to remain silent. The Supreme Court explained in *Brown, supra* at 61, 102 S.Ct. 1523, that *the preferred First Amendment remedy for misstatements and misrepresentations during the campaign is to encourage speech, not stifle it.*
>
> ... As the Supreme Court observed in *Brown, supra* at 60, 102 S.Ct. 1523:
>
> > *[The First] Amendment embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad, and between candidates for political office. The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech.*

*Id.* at 540, 541 (emphasis added). This Court, therefore, amended the canon, narrowing its application to avoid unconstitutional overbreadth. The revised language prohibits only statements which are "knowingly or recklessly ... false", thereby "provid[ing] the necessary 'breathing space'

for freedom of expression." *Id.* at 542.[16]

In Chmura II, this Court expanded on its holding in Chmura I, stressing that

> [s]peech that can reasonably be interpreted as communicating "rhetorical hyperbole," "parody," or "vigorous epithet" is constitutionally protected. *Id.* at 17, 110 S.Ct. 2695. Similarly, a statement of opinion is protected as long as the opinion "does not contain a provably false factual connotation ...." *Id.* at 20, 110 S.Ct. 2695. We are mindful that in protecting hyperbole, parody, epithet, and expressions of opinion, some judicial candidates may inevitably engage in "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co, supra* at 270, 84 S.Ct. 710. As a result of these attacks, "political speech by its nature will sometimes have unpalatable consequences." *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 357, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995). Indeed, as is arguably true in the present case, even potentially misleading or distorting statements may be protected. However, we believe that these rules are necessary in light of our "profound national commitment to the principle that debate [by judicial candidates] on public issues should be uninhibited, robust, and wide-open ...." *New York Times Co, supra* at 270, 84 S.Ct. 710.

464 Mich at 72-73 (emphasis added). The Board plurality quoted much of this language. Opinion at p 18.

After reviewing these controlling authorities from this Court, the Board carefully reviewed the now-familiar body of caselaw concerning attorneys' First Amendment rights, Opinion at pp 18-22, concluding, as it must, that

> [w]hen our Supreme Court's opinions in Chmura I and Chmura II are read together and with the numerous United States Supreme Court opinions which support them, *we must conclude that attorney statements which do not involve assertions of fact are protected by the First Amendment outside the context of a pending proceeding.*

Opinion at p 22 (emphasis added).

Rejecting the Administrator's civility arguments, the Board explained:

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[16]As noted above, Mr. Fieger was *not* charged in this case with violating MRPC 8.2(a), the rule of professional conduct prohibiting a lawyer from making a knowingly or recklessly false statement about the qualifications or integrity of a judicial officer.

> The Administrator argues, however, that the form of the respondent's remarks is so unacceptable in polite society that they may be regulated by the disciplinary authorities of this state. Again, Justice Rehnquist's opinion in Hustler illuminates basic concepts pertinent here:
>
> > "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression... And, as we stated in FCC v Pacifica Foundation, 438 U.S. 726 (1978):
> >
> > > "The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." Id., at 745-746.
> >
> > ... [Hustler, pp 55-57]
>
> Like some falsehoods, offensive words which do little to illuminate a subject are "'nevertheless inevitable in free debate,' ... and a rule that would impose strict liability ... for false factual assertions [or discourteous or offensive speech] would have an undoubted 'chilling' effect on speech relating to public figures that does have constitutional value. 'Freedoms of expression require "breathing space."'
>
> ... Chmura I and Chmura II follow the well-established rule that discipline may not be imposed for a lawyer's remarks unless the utterances are statements of fact. We can discern no statements of fact in respondent's vulgar rants.

Board opinion at pp 22, 23, 24.

The lead Board opinion also stressed that "an attorney would most certainly still have to guess at the contours of" MRPC 3.5(c) and 6.5(a) "in determining what statements might be deemed impermissibly discourteous or disrespectful by the Attorney Grievance Commission, or by a hearing panel, or this Board". Opinion at p 27. Noting that "'courtesy' and 'respect' have not been used to govern lawyer speech after a proceeding, in public, and regarding a matter of public concern, such

as the performance of a judge or the outcome of a proceeding", the opinion quotes from Justice Kennedy's majority opinion in Gentile v State Bar of Nevada, 501 US 1030, 111 SCt 2720, 115 LEd2d 888 (1991), to reiterate that the words at issue in Michigan's rules, like the Nevada Supreme Court Rule struck down in that case, "'have no settled usage or tradition of interpretation in law'". Opinion at p 28. Moreover, the danger of permitting an unconstitutionally vague rule to stand is particularly acute when the comments at issue are critical of those in power. As Justice Kennedy said for the Court in Gentile, 501 US at 1051:

> The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement, ... (cites only omitted), for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law. The question is not whether discriminatory enforcement occurred here ... but whether the Rule is so imprecise that discriminatory enforcement is a real possibility.

Opinion at p 28.

See also United States v Wunsch, 84 F3d 1110 (9th Cir 1996), where the Ninth Circuit found unconstitutionally vague a California statute which required "'an attorney ... [t]o abstain from all offensive personality", Calif Business & Professions Code §6068(f):

> As "offensive personality" could refer to any number of behaviors that many attorneys regularly engage in during the course of their zealous representation of their clients' interests, it would be impossible to know when such behavior would be offensive enough to invoke the statute. For the same reason, the statute is "so imprecise that discriminatory enforcement is a real possibility[,]" ... and is likely to have the effect of chilling some speech that is constitutionally protected, for fear of violating the statute.

84 F3d at 1119 (cite omitted).

The history of the continuing political, judicial and verbal conflict between those in power in Michigan who, in the views of their opponents, deprive tort victims of their fundamental human

right to fair compensation and those who seek to obtain fair compensation for those victims dramatically illustrates that the vagueness of Rules 3.5(c) and 6.5(a) truly does create a risk of discriminatory enforcement in this state. A Michigan attorney must guess at what the Commission, or a hearing panel, or the Board or this Court might consider to be discourteous, and it is impossible to make a principled distinction between the "civility" of Judge Chmura's statements, then-Governor Engler's statements discussed *infra*, campaign statements by members of this Court directed specifically at Mr. Fieger and Mr. Fieger's statements at issue here. Nor can the Administrator's position be accepted without taking the position that judges have a greater right to free speech critical of attorneys than do attorneys speaking critically of judges or that attorneys favored by the Commission have greater free speech rights than do attorneys not favored by the Commission.

The Administrator fails entirely to account for this well-settled, controlling body of law. Instead, the Administrator relies on the Orwellian argument that Mr. Fieger's comments were not speech and the patently wrong claim that statements of opinion, satire or hyperbole are not protected by First Amendment case law. Brief at p 12. The Administrator also asserts that "[t]he 'more speech is better' approach is just not suitable for pending cases." *Id.* The Administrator also continues to act as if New York Times v Sullivan, 376 US 254, 84 SCt 710, 11 LEd2d 686 (1964), and Grievance Administrator v Fieger, ADB #94-186-GA (1997) [Fieger II], were never decided. In this case involving precisely the same type of speech as was involved in Fieger II, *supra*, the Administrator does not even cite either case.

In arguing that Mr. Fieger's comments were not speech, the Administrator falsely asserts that the comments "did not relate to any issue of public concern", Brief at p 16, even though the comments plainly concerned, in a satirical and hyperbolic manner, judges who run for re-election.

This is quintessentially political speech. Even more quixotically, the Administrator cites United States v O'Brien, 391 US 367, 88 SCt 1673, 20 LEd2d 672 (1968), for the proposition that Mr. Fieger's words are not speech but are "conduct with an expressive element". Brief at pp 20-21. The Administrator's argument turns O'Brien upside down, since O'Brien involved not speech at all but the burning of a draft card and a claim that such conduct was constitutionally protected symbolic "speech".

As to the Administrator's assertion that statements of opinion, satire or hyperbole are protected only in cases involving defamation law, the argument is completely contradicted by this Court's holdings and reasoning in Chmura I, *supra*, and Chmura II, *supra*. Moreover, the distinction the Administrator would draw is constitutionally impermissible, lest the form of the state power exercised overrun the substance of the First Amendment right. As the Supreme Court stressed in New York Times, "*[t]he test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised*". 376 US at 265 (emphasis added).

The Administrator's reliance on Pickering v Board of Education, 391 US 563, 88 SCt 1731, 20 LEd2d 811 (1968), and Connick v Myers, 461 US 138, 103 SCt 1684, 75 LEd2d 708 (1983), for the proposition that attorney speech may be regulated in the employment context, Brief at p 22, is of no relevance to this case, since an attorney is manifestly *not* an employee of the State. Indeed, a key policy reason behind broad free speech rights for attorneys is the need in a democracy for a truly independent Bar.[17]

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[17]The Administrator has at least dropped the argument asserted in his application for leave to appeal equating public comments by members of the Bar with public statements by members of the active duty military. *Cf.* Application, at p 14, citing Parker v Levy, 417 US 733, 94 SCt 2547, 41 LEd2d 439 (1974).

The Administrator's argument as to the significance of the timing of Mr. Fieger's comments is also far wide of the mark. In its order granting leave to appeal in this matter, this Court directed the parties to address whether it is significant that "respondent's remarks were made before the expiration of the time period for filing an application for leave to appeal to this Court in the case that was the subject of the respondent's comments". The answer to the Court's question is emphatically "no", particularly where, as here, no violation of Rule 3.6 was charged.

As Gentile, *supra*, makes clear, only narrowly tailored restrictions on an attorney's free speech rights will pass constitutional muster. Not only must any such regulation be content- and party-neutral, it must be limited to those public comments which are substantially likely materially to influence the outcome of a trial or likely to make more difficult the selection of an impartial jury. 501 US at 1073-1076.

See also Restatement of the Law Governing Lawyers §109(1), which is even narrower in its limitation: "In representing a client in a matter before a tribunal, a lawyer may not make a statement outside the proceeding that a reasonable person would expect to be disseminated by means of public communication when the lawyer knows or reasonably should know that *the statement will have a substantial likelihood of materially prejudicing a juror or influencing or intimidating a prospective witness in the proceeding*" (emphasis added).[18]

In non-jury cases, the policy basis for limiting a lawyer's right to make public comments about the case, or the judge(s) presiding over the case, evaporates. Hirschkop v Snead, 594 F2d 356 (4th Cir 1979), is instructive. In that pre-Gentile case, the court upheld restrictions on attorneys'

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[18]Section 109(1) is comparable to MRPC 3.6, which prohibits public statements substantially likely materially to prejudice an adjudicative proceeding.

public comments about pending criminal jury trials but struck down restrictions as to non-jury trials, sentencings, disciplinary proceedings and administrative proceedings:

> It is unlikely that lawyers' comments could threaten the fairness of a bench trial, and this record does not indicate that they have. Moreover, we cannot assume that such comments would influence a judge to make unfair rulings against either the accused or the state. The suggestion that such an inference could be drawn from publicity highly critical of a judge was rejected in Pennekamp v. Florida, ... where the Court said: "In this case too many fine-drawn assumptions against the independence of judicial action must be made to call such a possibility a clear and present danger to justice."
>
> It is not enough that the rule is rationally related to fair bench trials. The gain in such trials must outweigh the loss of first amendment rights... Here the evidence discloses that the gain to fair bench trials is minimal, and the restriction on first amendment rights is substantial. We therefore conclude that with respect to bench trials the rule is unnecessarily broad.

594 F2d at 371-372 (citations omitted).

Comments regarding judges are of the same order. As the lead Board opinion aptly put it below,

> It is fair to say that judges, particularly appellate judges, will not be swayed by a lawyer's brickbats.

Opinion at p 20, n 17.

Moreover, if the Commission were truly concerned that Mr. Fieger's statements might have had some impact on judicial decision-making, it is reasonable to assume that the Formal Complaint would have charged him with violating MRPC 3.6. He was not, however, charged with a violation of that rule. *Cf.* Formal Complaint ¶16 (Appellant's Appendix at p 5a). It is also noteworthy that the justices of this Court who have refused to disqualify themselves from participation in this case despite criticism by and of Mr. Fieger have necessarily concluded that neither their comments about him nor his comments about them will affect their individual judgments about the case.

At the time Mr. Fieger made the remarks at issue, the Badalamenti case was over. The Court of Appeals had issued its opinion. Motions for reconsideration and applications for leave to appeal are infrequently granted. Unless a motion for rehearing in Badalamenti was granted (which it was not) or this Court granted leave to appeal (which it did not, 463 Mich. 980, 624 N.W.2d 186 (2001)), the opinion was the last word in the case. While the decision was not yet an absolutely final decision, a rule postponing Mr. Fieger's right to speak out until the decision was final would have entailed a delay of more than a year and a half, as the Court of Appeals decision was issued on August 20, 1999, and this Court denied leave to appeal on March 21, 2001. If a petition for a writ of *certiorari* in the United States Supreme Court had been filed, the delay would have been longer yet.

Prohibiting an attorney from speaking out about a case after it has been decided would be incompatible with the principles set out in Gentile. It would interfere with the public's right to hear the attorney's views of the case and its decision-makers while memories of the case are most fresh, and it would impinge on the attorney's right to speak out about judges, one or more of whom might be seeking re-election before the decision becomes final, at the time the public most needs to be able to hear those views.

Even a rule postponing an attorney's right to speak publicly about judges until those very judges finally rule on the attorney's motion or application would be impermissible. Since they decide when to rule on the pending matter, such a rule would allow those judges to control when the attorney is able to speak out about them.[19]

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[19]What constitutes a "pending" case is also not always clear, even to judges: Black's Law Dictionary defines "pending" as "'[b]egun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in process of settlement or adjustment.'"

The Grievance Administrator's argument also fails to take account of Michigan's long tradition of acceptance of lawyers' harsh and, at times, vitriolic public speech, some of which was noted favorably in the lead Board opinion. Opinion at pp 25-27. In the spring of 1969, during a time of extremely high racial tension in Detroit, two white Detroit police officers were killed in a shoot-out with members of a group called the Republic of New Africa. Three men, two of whom were African-American and one of whom was Hispanic-American, were arrested and prosecuted for the officers' murder. Following the conclusion of the preliminary examination in the case, Detroit attorney Kenneth V. Cockrel, who represented one of the defendants, publicly accused the judge who had presided at the examination of being, *inter alia*, a "racist", a "pirate", a "bandit" and a "honky dog fool". Contempt proceedings initiated against Cockrel were dismissed after approximately one day of hearing, and no professional discipline proceeding was ever initiated.

In October 1993, then-Governor John Engler, a member of the State Bar who was angered by an unfavorable ruling by Ingham County Circuit Judge James Giddings in a case concerning prison conditions, publicly called Judge Giddings a "lunatic" who "got his law degree from a mail-order school". Cain v Department of Corrections, 451 Mich 470, 477, 548 NW2d 210 (1996) at n

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People v Sanders, 58 Mich App 512, 517, 228 NW2d 439 (1975). In Mary v Lewis, 399 Mich 401, 249 NW2d 102 (1976), an amendment to the law governing prejudgment garnishments had taken effect on April 1, 1975, and was, by its express terms, applicable to "all actions pending or commenced on or after the effective date" of the act. On April 1, 1975, the case was before this Court on an application for leave to appeal. This Court nevertheless declined to construe the amendment to apply to the case before it. Similarly, in People v Morales, 2002 wl 1424802 (Mich App 2002), the Court of Appeals construed MRPC 3.5(b) not to prohibit a prosecutor from speaking with members of a jury which had been dismissed after being unable to reach a verdict. While the *jury* had been dismissed, the *case* itself was unquestionably still pending, and Rule 3.5(b) prohibits an attorney from communicating *ex parte* with a juror "concerning a pending matter". Nevertheless, the Court of Appeals concluded that the prosecutor hadn't spoken to the jurors "concerning a 'pending matter'".

12. Judge Giddings filed a grievance against the governor, but the Grievance Commission did not initiate formal proceedings against him.

In 1999, following this Court's 4-3 decision against his client in Husted v Dobbs, 459 Mich 500, 591 NW2d 642 (1999), Kalamazoo attorney James Ford publicly criticized the majority, stating:

> "The ruling is completely political and makes no sense when compared to the language and history of the no-fault statute."
>
> "This is an almost absurd decision on its face. And *until widows and orphans can donate as much money as insurance companies [to judicial campaigns], we'll continue to see these types of decisions.*"

Michigan Lawyers Weekly, May 10, 1999 (emphasis added). A grievance filed against Ford was dismissed by the Commission without the filing of a formal complaint.[20]

The Commission also declined to initiate discipline proceedings against Mr. Fieger for public comments, *inter alia,* questioning whether then-Judge, now-Justice Corrigan and the Oakland County Prosecutor's office had acted improperly against him and his client Dr. Jack Kevorkian. The Oakland Press, February 11, 1996. On March 25, 1996, then-Judge Corrigan filed a request for investigation against Mr. Fieger for these alleged remarks; on April 26, 2002, the Commission dismissed the request for investigation. AGC #0906/96.

In People v Ward, 459 Mich 602, 622, 594 NW2d 47 (1999), the dissenters accused the majority of using "Orwellian logic".

In a May 1999 Michigan Bar Journal interview, former Justice Patricia Boyle, one of the attorneys representing DaimlerChrysler in Gilbert, *supra*, described this Court's decisions from the

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[20]The grievance filed against Ford was publicly disclosed by him and met with widespread criticism throughout the Michigan legal community. The October 25, 1999, issue of Michigan Lawyers Weekly, for example, contained a full-page advertisement signed by 73 attorneys repeating Ford's comments. See also 79 Mich Bar J 9-15 (Jan 2000).

1970s as "outrageous" and "idiotic". McAlpine and Baergen, "Justice Patricia Boyle Leaves a Legacy of Decisions Laced with Principle", 78 Mich Bar J 404, 408 (1999).[21]

During an unsuccessful run for a district court judgeship in 1994, attorney Stephen Korn publicly quoted unnamed lawyers as claiming that the incumbent was a "witch... a shrew, crazy, unstable... a malignant cancer to our judicial system" who "gives PMS and women a bad name". "Judicial Contests Turn Ugly", *supra*. The Grievance Commission did not initiate charges against Korn.

Lawyers unquestionably and understandably play a critical role in our society in informing the public about real or perceived short-comings of the legal system. They are, in fact, uniquely qualified to explain the workings of the legal system to laypersons. Highly regarded law professor and author Alan Dershowitz has noted that

> [m]ost insiders – lawyers and judges – won't talk. Most outsiders – law professors and journalists – don't really know. Few of those who are outside the club ever get close enough to the day-to-day operations of the system to appreciate how it really works.
>
> Some insiders won't talk because they have a stake in not exposing the dark underside of the legal profession. Others are afraid of reprisals...
>
> This dichotomy between insiders who know but won't say and outsiders who will say but don't know has deprived the public of a realistic assessment of the American justice system.

Dershowitz, The Best Defense (Random House 1983) at p xiii.

As one should expect in an adversary system within a highly polarized society in which

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[21]At times, the barb is tinged with humor. Robert Traver – the pen name of John Voelker, author of Anatomy of a Murder and later a justice of this Court – famously wrote in Laughing Whitefish (McGraw-Hill 1965) at p 276, that "'[a] judge is simply a law student who marks his own examination papers.'"

people from very different social, cultural and economic backgrounds hold widely differing political, social and cultural views – and as the long-standing conflicts underlying the instant case well illustrate – different lawyers' and judges' opinions of courts, judges and legal issues often diverge starkly. At times, lawyers' public communications about courts, judges and legal issues are strident, crude and hyperbolic. Feelings about the propriety of a lawyer's non-factual criticisms of courts and judges are often strongest when the complaining lawyer has represented someone he or she believes was the victim of unfair treatment by wealthier, more powerful persons or institutions. American legal history is rife with examples of sharp lawyer criticism of judges and judges' criticisms of one another and of lawyers. Many of these critiques echo the theme of unfairness, and all of them serve an important public function.

Finally, the greatest degree of latitude is necessary for expression of lawyers' views about judges – even when expressed "churlish[ly]" or "crude[ly]" – in a jurisdiction such as Michigan in which all judges are elected. Const 1963, art VI, §2 (Supreme Court), §8 (Court of Appeals), §12 (circuit courts) and §16 (probate courts); MCLA §168.467a (district courts).

In sum,

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion... an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

Bridges v California, 314 US 252, 270-271, 62 SCt 190, 86 LEd 192 (1941).

> "Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political * * * truth." Thornhill v. Alabama, 310 U.S. 88, 95, 60 S.Ct. 736, 740, 84 L.Ed. 1093... Men are entitled to speak as they please on matters vital to them; errors in judgment or unsubstantiated opinions may be exposed, of course, but not through punishment for

> contempt for the expression. Under our system of government, counterargument and education are the weapons available to expose these matters, not abridgment of the rights of free speech and assembly.

Wood v Georgia, 370 US 375, 388, 389, 82 SCt 1364, 8 LEd2d 569 (1962).

> Because of the importance of open discourse, particularly on matters involving government, the penalty for most of these false statements should be some degree of lowered esteem, imposed after a trial in the court of public opinion. The circumstances will dictate whether people will condemn or forgive the speaker. Here, as elsewhere, *the First Amendment counsels that the best remedy is counterspeech not censorship. Our Rules of Professional Conduct adopt this approach as well.*

Grievance Administrator v Fieger, ADB #94-186-GA (1997) [Fieger II] (emphasis added).

For all of these reasons, the Board's decision in this matter was correct and should be affirmed.

III.

BECAUSE RESPONDENT-APPELLEE'S PUBLIC CRITICISMS OF THREE JUDGES OF THE COURT OF APPEALS DID NOT OCCUR BEFORE THE TRIBUNAL, NEITHER MRPC 3.5(c) NOR 6.5(a) WAS VIOLATED.

A.

MRPC 3.5(c) does not apply to a lawyer's public criticisms of public officials.

MRPC 3.5(c) provides that a lawyer shall not "engage in undignified or discourteous conduct toward the tribunal". Located among the rules under the heading "Advocate",[22] Rule 3.5(c) is one part of a three-part rule entitled "Impartiality and Decorum of the Tribunal". Rules 3.5(a) and (b) respectively prohibit unlawful attempts to influence a judge, juror, prospective juror or other official and *ex parte* communications with such persons, except as provided by law. Neither in its title nor in its body, nor in its placement within the Rules, does Rule 3.5 regulate or suggest an intent to regulate attorneys' out-of-court, public comments about judges. Rather, attorneys' public comments about judges are the subject of Rule 8.2(a), one of the rules under the heading "Maintaining the Integrity of the Profession". The Commission did *not*, however, charge Mr. Fieger with violating Rule 8.2(a) in this case.

Consistent with the Board's construction of Rule 3.5(c) in Fieger II, *supra*, the lead Board opinion in this case concluded that the term "toward the tribunal" precludes application of this rule to an attorney's comments *about* a judge. In coming to this conclusion, the opinion carefully

[22]The other rules in this section are Rule 3.1, which concerns an attorney's obligation not to pursue frivolous claims or defenses; Rule 3.2, which requires an attorney to make reasonable efforts to expedite litigation consistent with a client's interests; Rule 3.3, which addresses an attorney's obligations of candor toward a tribunal; Rule 3.4, which concerns an attorney's obligations of fairness to opposing counsel and parties; Rule 3.6, which concerns trial publicity; and Rule 3.7, which concerns attorneys as witnesses.

reviewed the history of MRPC 3.5(c) and compared its language with that of its counterpart in the American Bar Association Model Rules of Professional Conduct:

> MRPC 3.5(c) contains modifications to the language of the former Code. Instead of retaining a prohibition against "undignified or discourteous conduct which is *degrading to* a tribunal," the formulation was changed to prohibit such conduct "*toward* a tribunal." If the rule had been intended to prohibit discourteous *statements about* the tribunal, those words could easily have been chosen. However, "conduct toward the tribunal," connotes a more direct connection between the actor and the subject of the discourteous or disrespectful conduct.

Opinion at p 12. The opinion also noted that the comment to MRPC 3.5(c) "does not attempt to expand the text of the rule by suggesting that the rule should be applied to public statements not directed to a judge and made after the opinion has been issued". *Id.*

The correctness of this construction of Rule 3.5(c) is further buttressed by the fact that, as noted above, the subject of an attorney's comments about a judge is explicitly covered elsewhere in the rules at Rule 8.2(a).

Importantly, the Administrator cannot cite even a single case in which an attorney has been found to violate Rule 3.5(c) for out-of-court, public comments about a judge.[23] In fact, the Commission makes no argument whatever regarding the construction of MRPC 3.5(c) other than in relation to the First Amendment issues in the case. It is utterly silent on the subject.

For the reasons persuasively set out in the lead Board opinion, Rule 3.5(c) does not apply to the public comments at issue here, and Mr. Fieger's statements cannot be held to violate the rule.

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[23]Even in Grievance Administrator v Vos, 466 Mich 1211, 644 NW2d 728 (2002), where this Court remanded a Board decision for consideration of whether the respondent's "use of profanity directed at the presiding magistrate during a proceeding but off the record and his other conduct was discourteous in violation of MRPC 3.5(c) and/or MRPC 6.5(a)", the conduct occurred *in* a magistrate's hearing room. Plurality Opinion at p 7.

B.

MRPC 6.5(a) does not apply to a lawyer's public criticisms of public officials.

MRPC 6.5(a) provides in relevant part that

> A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic.

Rule 6.5(a) has no counterpart in the American Bar Association Model Rules of Professional Conduct. Placed among the rules concerning a lawyer's public service, its purpose is laudatory. Its broad language, however, leaves it vulnerable to inconsistent or abusive application. While the rule on its face is extremely broad, the Board and hearing panels have refused to apply it indiscriminately. A review of the Board's decisions and those of hearing panels applying the rule in contested cases reveals that the rule has *never* been applied to a lawyer's out-of-court, public criticism of the judiciary. Consistent with the rule's limitation to conduct which "treats" another, it has *only* been applied in situations involving assaultive, threatening or obstructive *direct interactions* between persons. Moreover, as with Rule 3.5(c), it is significant that the subject of a lawyer's comments about judges is specifically addressed at Rule 8.2(a).

Specifically, the Board and hearing panels have found Rule 6.5(a) to apply where an attorney either forced a client to engage in sexual intercourse or made unwanted sexual advances to clients,[24]

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[24] *Cf.* Grievance Administrator v Neff, ADB #95-094-GA (1996); Grievance Administrator v Bowman, ADB #95-095-GA (1996); Grievance Administrator v Childress, ADB #95-146-GA (1996) and ADB #97-169-GA and #97-183-FA (1998); Grievance Administrator v Klintworth, ADB #95-175-GA (1997); Grievance Administrator v Williams, ADB #98-203-GA (2000); Grievance Administrator v Gold, ADB #99-035-GA (2002); and Grievance Administrator v Kohler, ADB #01-049-GA (2001). Where an attorney engages in a *consensual* sexual relationship with a client, however, the Board has held that the rule does *not* apply. Grievance Administrator v Stevens, ADB #95-240-GA (1997). A consensual sexual relationship

assaulted opposing counsel or grabbed opposing counsel's tie during a deposition,[25] made sexually explicit comments *and* otherwise "interfered with the orderly process of the deposition",[26] or made explicitly threatening statements to another in the course of direct communication with the person or in a telephone message to a person.[27]

The use of language alone in the course of private communications does *not* violate the rule. *Cf., e.g.*, Grievance Administrator v Szabo, ADB #96-228-GA (1998) (attorney challenged opposing counsel to a fight in a courthouse hallway and called him "a fucking asshole" at least twice); Grievance Administrator v MacDonald, ADB #00-004-GA (2001) (attorney called opposing counsel a "lying son of a bitch" and a "shyster" during a telephone conversation).[28]

The case at bar stands in stark contrast to any case in which the rule has *ever* been found to apply. It does not involve assaultive or threatening behavior, and it does not involve direct communication with another person. That is, as properly concluded in the lead Board opinion, it does not involve "treat[ing]" another person:

"Treat" has been defined, and we think is most often intended to mean, "To act or

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with a client may, however, constitute a prohibited conflict of interest in violation of MRPC 1.7(b). *Cf., e.g.*, Williams, *supra*.

[25]Grievance Administrator v Lakin, ADB #96-166-GA (1997); Grievance Administrator v Golden, ADB #96-269-GA (1999), grabbed opposing counsel's tie during a deposition, Grievance Administrator v McKeen, ADB #00-061-GA (2003).

[26]Grievance Administrator v Farrell, ADB #95-244-GA (1996).

[27]Grievance Administrator v Warren, ADB #01-016-GA (2003); Grievance Administrator v Sloan, ADB #98-106-GA, #98-176-GA (1999).

[28]While Grievance Administrator v Beer, ADB #93-234-GA (1994), has at time been discussed in connection with cases applying Rule 6.5(a), the facts of the case pre-date the adoption of the rule, and Beer was not charged with violating this rule.

> behave in a specified manner toward." American Heritage Dictionary of the English Language (Houghton Mifflin Co, 4th ed, 2000). MRPC 6.5(a), like MRPC 3.5(c), seems clearly to extend to discourtesy toward and disrespect of participants in the legal system when such conduct interferes or has the potential to interfere with the orderly administration of justice. To apply this rule in this case, we would have to hold that "treat" means to make comments about a person outside their presence, after the conclusion of the proceedings. This would sweep in any comment critical of a participant's role in the justice system even after that role had been concluded. In this country, many trials or other proceedings are subject to discussion and analysis after their conclusion. Nothing in Rule 6.5 suggests that "persons involved in the legal process" may not ever be criticized for their role in that process, not even after the involvement has ceased.

Opinion at p 13.

As with Rule 3.5(c), the Commission makes no argument whatever as to the construction of this rule other than in relation to the First Amendment. Once again, its silence is telling, for there is no principled basis upon which to construe this rule to apply to the speech at issue here.

Just as the broad language of former Canon 7(B)(1)(d) of the Michigan Code of Judicial Conduct could not promote its lofty goal of civility in judicial campaigns through "sweeping restraints", Chmura I, *supra*, Rule 6.5(a) may not be construed to apply to speech of the type at issue here.

For all of these reasons, Mr. Fieger's comments may not be held to violate the rule.

## RELIEF REQUESTED

For all the reasons stated above, the decision below should be affirmed.

Respectfully submitted,


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